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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 161

FEDERAL TRADE COMMISSION, *Petitioner*

v.

EVIS MANUFACTURING CO., et al.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 287 F.2d 831. The opinion of the Federal Trade Commission is printed in Appendix B to the Petition for a Writ of Certiorari, p. 64.

PRELIMINARY STATEMENT

The sole ground upon which the Commission seeks review in this case is its assertion that the case presents the "important question" "whether the Federal Trade Commission, in determining the capacities of a product, may accept expert scientific testimony, after making its

own appraisal of the criticisms of the experts' tests, or must be governed by the testimony of satisfied consumers" (Pet. pp. 9-10). The Commission cites *Federal Trade Commission v. Sewell* (1957) 353 U.S. 969, and even suggests that on the authority of that case this Court may deem it appropriate to grant the writ in this case and reverse without more.

Most respectfully we submit that the statement of the case in the petition for certiorari which purportedly presents the above question is scanty, inaccurate and misleading; that the question posed by the Commission is not presented on this record; that the *Sewell* case is inapplicable; and that, for the reasons hereinafter stated, no grounds for a writ exist.

STATEMENT OF THE CASE

A. Proceedings below.

This proceeding was brought in 1954 by the Federal Trade Commission to enjoin alleged misrepresentations in connection with the sale of a water conditioning unit invented by respondent Wells and manufactured and sold by respondent Evis Manufacturing Company (R. I, 1). Hearings commenced on May 12, 1954, and ended four years later, in April, 1958. The testimony of 124 witnesses was taken in Los Angeles, San Francisco and Fresno, California; Pullman, Tacoma and Seattle, Washington; Portland, Oregon; Cleveland, Ohio; Washington, D.C.; Dallas, Texas; and Charlottesville, Virginia. Sixty-eight exhibits were introduced. The transcript comprises 4,000 pages.

Twice the Hearing Examiner, who heard the witnesses and judged their credibility, held that the Commission had failed to sustain the allegations of the complaint (R. I, 512, 692). Twice the Commission reversed. It held on the first appeal that further evidence should be taken (R. I, 654); on the second, that the findings of the Hearing Examiner should be disregarded and a cease and desist order should issue (R. I, 797-817). On review, the Court of Appeals reversed, holding that there is no substantial evidence to support the decision of the Commission.

B. The facts.

Prior to 1952 respondent Wells, after many years of experimentation (R. II, 416), invented a specially processed metal casting, designed to be fitted into water systems for the purpose of beneficially affecting water.

The unit was made of specially processed metal with inclusions not ordinarily present in cast iron (R. I, 422, 425-426). While the complaint charged that it was false to represent that the unit was made of a specially processed metal, both the Hearing Examiner and the Commission held that this charge had not been sustained (R. I, 698, 802). The Commission's own witnesses, after spectrographic and photomicrographic analyses, testified that the metal was specially processed and contained inclusions not ordinarily found in cast iron (R. II, 93, 479, 929, 942).

In 1952 respondent Evis Manufacturing Company was organized to manufacture and market the unit (R. II, 412). The venture was an immediate success. Sales in 1953, the first full year of operation, were approximately $1,250,000 (R. I, 333). All units were sold with a money

back guarantee (R. IV, 2916, 3148; and see for example, CX 33, R. VI, 902). Numerous units were installed on a free trial basis (R. III, 1812, 2120, 2135, 2165; R. IV, 2275, 2320, 2707; R. V, 3469).

The company's customers included the most responsible and informed buyers in America: the United States Government,[1] State schools, colleges and institutions,[2] steamship companies,[3] oil well drilling companies,[4] major oil companies,[5] lumber and plywood mills,[6] department stores,[7] laundries,[8] restaurants,[9] and numerous other substantial businesses and manufacturing plants.[10]

Without exception every witness who had used the unit in the normal, practical installations for which it was intended testified to beneficial results. Ninety-two witnesses testified concerning 255 installations. These witnesses included trained representatives of leading industries and institutions: air conditioning and refrigera-

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[1]R.IV, 2325-2340; 2677-2687; 2688-2703; 2704-2718.

[2]R.III, 2218-2233; R.IV, 2838-2849; 3366-3390; R.V, 3460-3493.

[3]R.IV, 2388-2412; 2637-2663; 2672-2677; 2748-2763; 2892-2906; 3168-3178; 3392-3397; 3397-3405; R.VI, 1026-1062; 1066-1099; 1100-1129; 1131-1161; see also RX 48, R.VI, 1013-1017.

[4]R.III, 2033-2060; R.V 3409-3436; 3436-3450; 3518-3529, 3543-3558; 3559-3563, 3583-3611; 3705-3723.

[5]R.III, 2145-2155.

[6]R.III, 1963-1973; R.IV, 3101-3118; 3119-3132; 3133-3142; 3178-3190; 3220-3226; 3237-3252.

[7]R.III, 1839-1891; 1976-2011.

[8]R.IV, 2598-2620; 3190-3202; 3329-3338.

[9]R.III, 1804-1839; 1839-1891; 1976-2011.

[10]R.III, 1892-1930; 2090-2114; 2157-2192; 2268-2291; R.VI, 2551-2559; 2764-2772; 3077-3089; R.V, 3530-3543; 3564-3581; 3686-3704.

tion,[11] newspaper,[12] canning,[13] meat packing,[14] marine repair,[15] lumber and lumber products,[16] petroleum,[17] restaurant,[18] school,[19] department store,[20] supermarket,[21] fish processing,[22] hotel,[23] ranching and farming,[24] nursery,[25] bottling[26] and tool manufacturing,[27] as well as private homes and apartment houses.[28]

In the steamship industry alone the testimony showed that 281 Evis units (all but a few of which are in addition to the 255 units mentioned above) were in use on 245 vessels of 76 shipping concerns, including such internationally known companies as American Mail Line, American President Lines, Isthmian Steamship Company, Luckenbach Steamship Company, Moore-McCormack Lines, Inc., Matson Navigation Company, Pacific Far East Lines, Inc.,

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[11]R.III. 1931-1963; R.IV. 2268-2291.

[12]R.IV. 2292-2296, 2307-2325; 2296-2307.

[13]R.III. 2157-2192.

[14]R.III. 1892-1930; R.V. 3612-3625.

[15]R.IV. 2346-2360.

[16]R.III. 1963-1973; R.IV. 3101-3118; 3119-3132; 3133-3142; 3178-3190; 3220-3226; 3237-3252.

[17]R.III. 2033-2060; R.V. 3409-3436; 3436-3450; 3518-3529, 3543-3558; 3559-3563, 3583-3611; 3643-3673; 3705-3723.

[18]R.III. 1804-1839; 1839-1891; 1976-2011.

[19]R.III. 2218-2233; R.IV. 2838-2849; 3366-3390; R.V. 3460-3493.

[20]R.III. 1839-1891; 1976-2011.

[21]R.IV. 2551-2559.

[22]R.IV. 2474-2481; 3352-3362.

[23]R.V. 3493-3502; 3502-3516.

[24]R.III. 1732-1777; 1804-1839; 2011-2032; 2114-2129, 2138-2145.

[25]R.III. 2069-2090; 2234-2242; 2243-2253; 2253-2266.

[26]R.III. 2129-2137.

[27]R.III. 2060-2067.

[28]R.III. 1777-1804; 2011-2032; 2033-2060; 2069-2090; 2253-2266; R.IV. 2875-2891; R.V. 3675-3685.

Pacific Transport Lines, Pope & Talbot, Inc., Rotterdam-Lloyd Line, Swedish American Line, Transoceanic Marine Corporation, United Fruit Company and Waterman Steamship Corporation (R. VI, 1013-1017). Many of these companies equipped their vessels only after they had first established to their own satisfaction, through actual shipboard trial, that the Evis unit produced the results for which they were looking (R. IV, 2443). United Fruit Company has installations on 25 vessels, Waterman Steamship Corporation on 30 vessels, Luckenbach Steamship Company on 14 vessels, and the Military Sea Transport Service of the United States Government on 4 vessels (R. VI, 1013-1017).

Experienced operating engineers testified concerning carefully controlled parallel tests in which an Evis unit was installed on one piece of equipment and other identical or similar equipment was left unchanged. In each instance, marked differences were evident.[29]

These witnesses were not the ignorant and the gullible. With few exceptions they were licensed professional or operating engineers with experienced backgrounds in operating water systems and related equipment. In every sense they were experts in their fields. They testified to objective, physical, observable results (removal or prevention of scale in water systems, etc.) as to which no possible

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[29]The Post Office and Courthouse Building in Fresno, California (R.IV, 2325-2340; 2677-2687); the plant of the Central Valley Ice Company in Fresno, California (R.IV, 2268-2291); the Fresno Bee Building, Fresno, California (R.IV, 2292-2296; 2307-2325; 2296-2307); the Bridgford Packing Company plant at Anaheim, California (R.III, 1892-1930); the G. W. Hunae Company cannery at Turlock, California (R.III, 2177-2192).

element of judgment or mistake could enter. They were not contradicted; they were not impeached. They represented all segments of the economy, including Federal and State agencies and scores of nationally known concerns. Testimony of successful performance came from representatives of such informed buyers and users as the United States Post Office Department (R. IV, 2325-2340; 2677-2687), the United States Navy Department (R. IV, 2688-2703; 2704-2718), the General Services Administration of the United States Government (R. IV, 2677-2687), G. W. Hume Company (R. III, 2157-2192), Bridgford Packing Company (R. III, 1892-1930), American Rock Wool Corporation (R. IV, 3077-3089), the Fresno Bee (R. IV, 2292-2296; 2307-2325; 2296-2307), Central Valley Ice Company (R. IV, 2268-2291), North Pacific Plywood Company (R. IV, 3220-3226), St. Joseph's Hospital (R. IV, 3339-3349), Knott's Berry Farm (R. III, 1804-1839), Union Ice Company (R. III, 1931-1963), Buffum's Department Store (R. III, 1839-1891), The Harris Company (R. III, 1976-2011), Pacific Western Oil Corporation (the producing company for Tidewater Associated Oil Company) (R. III, 2145-2155), Three States Natural Gas Company (R. V, 3564-3581), Rowan Oil Company (R. V, 3705-3723), Delta Gulf Drilling Company (R. V, 3436-3450), Bercut-Richards Packing Company (R. IV, 2536-2551), Roy Guffy Drilling Co. (R. V, 3409-3436), Helmerich & Payne, Inc. (R. V, 3518-3529; 3543-3558), Pope & Talbot, Inc. (R. IV, 2388-2412; 3397-3405; R. VI, 1131-1161), Union Oil Company (R. VI, 1066-1099), American President Lines (R. IV, 2748-2763), Transoceanic Marine Corporation (R. IV, 2637-2663), Waterman Corporation of California (R. IV,

2672-2677; R. VI, 1026-1062), American Mail Line (R. IV, 3392-3397), United Fruit Company (R. VI, 1066-1099), and Nehi Bottling Co. (R. III, 2129-2137).

In the very courthouse in which the Hearing Examiner in this case took testimony, in Fresno, California, Evis units were installed and were in operation. Mr. Shepard, Chief of the Construction and Supervision Branch, Public Building Service, General Services Administration of the United States, who is responsible for the mechanical equipment in all Federally owned and operated buildings in California, Nevada, Arizona and Hawaii (R. IV, 2678), and his Superintending Engineer, Mr. Crosby, testified (R. IV, 2680-2683) concerning parallel tests on the cooling system of the courthouse which demonstrated the outstanding performance of the Evis unit in preventing the formation of scale. On the basis of these tests Mr. Shepard ordered installations in other Federal buildings in California and Arizona where they operated with equal success in solving water problems which had been encountered.

A truly dramatic instance of the effect of the Evis unit upon laundry operations was that described by the manager of the Rainier State School at Buckley, Washington. There, mentally retarded children who worked in the laundry were "trained to put just a measured amount of soap in a washing machine, [so that] once they have acquired that habit, * * * they will do it almost automatically" (R. IV, 3383). On the morning after the Evis unit was installed the washers were "boiling soap suds all over the place" before the operator could reduce the amount of soap used (R. IV, 3382).

As opposed to the foregoing the Commission did not introduce a single word of testimony concerning the Evis unit in actual operation. Instead it relied entirely upon the testimony of so-called expert witnesses who based their opinions upon laboratory experiments. Five of these experts[30] testified to spectrographic and photomicrographic tests of the metal in the Evis unit. Since these tests were addressed entirely to the metal's physical composition, and since both the Hearing Examiner and the Commission held that this testimony failed to sustain the charge that the unit is not made of specially processed metal, their testimony is now irrelevant.

The remaining witnesses (with the exception noted at p. 23, infra), testified concerning laboratory tests each had made upon water purportedly[31] treated by the Evis unit. The tests were wholly artificial, either having no relevance to any claim made by petitioners, or conducted under laboratory conditions so alien to actual operating conditions as to have no probative value (see pp. 10-23, infra).

Further, these "experts," as the Commission concedes, failed to install and use the Evis unit in accordance with the manufacturer's instructions. Their failure in this regard was not harmless oversight, but so vital as to render their opinions, as the Court of Appeals held, of no evidentiary value (see pp. 24-29, infra). Indeed, in

[30]Messrs. Abbitt, McBurney, Corfield, Czyzewski and Uman (R. II, 705, 358, 362, 925, 89).

[31]Since, as the court below held and as we point out hereafter, the experts did not properly install the Evis units, there is no evidence in this record that Evis treated water was in fact used in their experiments.

the only two instances where respondents knew that tests were being conducted and tendered their engineers to advise and assist in the installation and operation of the equipment, the offers were refused (R. II, 813; III, 1266-1267), in one case so contemptuously[32] that the Hearing Examiner held, on the basis of this occurrence and others, that the witness entered upon and conducted his so-called scientific tests with a preconceived opinion that the Evis unit was worthless, that his denial of a prejudgment of the merits was so evasive as to be unworthy of belief, and that "the factual content [of his testimony] is too intermingled and clouded with evasions, qualifications and attempted explanations" to constitute substantial evidence (R. I, 718-719).[33]

One of the numerous instances which illustrates the total unreality of these laboratory tests is the case of Dr. Hoffman of the Bureau of Standards, the Commission's principal witness. Under cross-examination he testified that during his laboratory tests he visited the Experiment Station of the Department of Agriculture at Beltsville, Maryland, and saw an Evis unit in operation (R. III, 1202). When asked whether it was not a fact that the unit was working successfully, he replied (R. III, 1204):

> "I am a little reluctant to go into the installations in another department, if I can avoid it. It does not concern my tests any more than the mere inspection to see whether it was grounded."

[32]Dr. Albrook of Washington State College. See especially R. II, 717-719.

[33]The associate of this witness, Dr. Adams, was relieved by his superior at Washington State College from further investigation of the Evis unit because of his "personal bias in the matter of conducting tests" (Decision of the Hearing Examiner, R.I, 718).

At this point the Hearing Examiner sustained objections to any further questioning of Dr. Hoffman concerning this installation (R. III, 1204-1207). After respondents had made offers of proof, however (R. III, 1207-1208), the Examiner modified his ruling (R. III, 1237) and thereafter Dr. Hoffman testified (R. III, 1339-1340):

"Q. Yesterday there was reference to the installation of the Evis unit at the United States Department of Agriculture Station at Beltsville—do you recall that?

A. I recall it.

Q. You were out there and examined that installation, did you not?

A. I was out there.

Q. You did not see the installation?

A. I saw it, the installation.

Q. There were two evaporator condensers, were there not?

A. There were.

Q. On one of which there was an Evis unit?

A. Yes.

Q. On the other there was not an Evis unit?

A. That is correct.

Q. And you observed, did you, Doctor, that the Evis unit was clean as compared with the non-Evis unit which was scaled?

A. I saw that, yes, sir.

Q. And you were advised, were you not, by the personnel at the station that in the case of the Evis unit they had at that time been able to operate it for eight weeks without cleaning as distinguished from their prior practice of cleaning it every 10 days to 2 weeks?

A. I was not so advised, but * * * I overheard this statement made.

Q. You were present, were you not?
A. I was present."

Dr. Hoffman was then further cross-examined (R. III, 1340-1343):

"Q. Now, Doctor, have you also had an opportunity to personally inspect other installations on United States Government property of Evis units?

A. I was over to the Old Dominion Building, I believe it is called, in Arlington, to see an installation there.

* * * * *

Q. That installation, Doctor, in that did you observe that this cooling unit * * * had de-scaled with the Evis unit?

A. I saw the unit only once. The unit had parts of the pipes where scale had broken off and was lying in the bottom. I know nothing about the history of it or what caused that to fall off. I could not make any positive statements as to the value of the water treatment.

Q. In the course of your inspection at that building did you make inquiry of the operating personnel there as to what the conditions had been before and after the installation of the Evis unit?

A. I forget whether I made any inquiry. I was there mainly to see the grounding system that they were using. * * *

* * * * *

Q. I see. The fact that the unit was de-scaling there and you saw evidence of that in your opinion carried no weight one way or the other, Doctor, is that it?

A. I have to base that—I hope you understand—on the fact that I did not see another one close by under

the same circumstances which did not have an Evis conditioner on it.

Q. All right.

A. I must hold to that."

And yet, as shown above, Dr. Hoffman *did* see two evaporative condensers "close by under the same circumstances" at the Department of Agriculture Station at Beltsville, Maryland, one equipped and the other not equipped with an Evis conditioner. He "observed * * * that the Evis unit was clean as compared with the non-Evis unit which was scaled." He overheard "personnel at the station [say] that in the case of the Evis unit they had at that time been able to operate it for eight weeks without cleaning as distinguished from their prior practice of cleaning it every 10 days to 2 weeks." He disregarded these two installations "close by under the same circumstances" because he was "a little reluctant to go into the installations in another department * * *."

It is of this witness that the Commission, in the decision under review, says (R. I, 811):

> "Dr. James Irvin Hoffman, Chief of the Surface Chemistry Section and Assistant Chief of the Chemistry Division of the National Bureau of Standards * * * testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it could have no effect upon water."

The Commission's expert testimony was as follows:

Eight experts made soap hardness or similar tests which proved that Evis treated water did not differ chemically

from untreated water.[34] This proved exactly what respondents have represented. Over and over the Evis literature states that the unit does not change the chemical composition of water (CX 8, R. VI, 827; CX 27, R. VI, 879, 881; CX 31, R. VI, 896, 899). When the testimony of the eighth of these witnesses was offered by the Commission, the Hearing Examiner finally inquired (R. V, 3952):

> "May I ask you, what is the relevancy, since there is no claim of chemical change resulting from the use of an Evis? What is the purpose of showing the chemical analyses?".

Four of the witnesses[35] performed "dry scale" tests, a test similar to putting a teakettle on the stove, boiling it dry and then measuring the solids deposited on its walls. Respondents have never represented that the Evis unit removes solids from water. No water treatment can do this. The function of water treatments is to affect the solids in water, physically or chemically, so that in operation they are flushed out with waste water. The Commission's own witness, Dr. Hoffman of the Bureau of Standards, characterized these dry-scale tests as "irrelevant * * * There was no sense in burdening the hearing with those experiments" (R. III, 1215).

Commission witness Merrell put odor-bearing water in two beakers, added Evis treated water[36] to one and no

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[34]Merrell (R.II, 8), Carty (R.II, 110), Kleiner (R.II, 328), de Bussieres (R.II, 479), Benezra (R.II, 559), Albrook (R.II, 584), Adams (R.II, 846) and Gildea (R.V, 3947-3953).

[35]Mallory (R.II, 135-138), de Bussieres (R.II, 479), Benezra (R.II, 559), and Johnson (R.V, 3793).

[36]See footnote 31, supra, p. 9.

treated water to the other and "sniffed" each sample. He detected no difference (R. II, 15).[37]

The same witness filled one beaker with treated[38] water and one with untreated water, let each stand 30 days, and then noted that each seemed to have the same amount of dust and scum on top (R. II, 15). From this he concluded that the Evis unit does not "keep drains and sumps free from scum." On cross-examination he finally characterized his own experiment as "a very weak test • • • just cooked up to disprove that one statement that was made in the literature" (R. II, 70).

To disprove respondents' claim that the Evis unit "aids operation of base exchange softeners" the same witness passed a little more than 16 quarts of both treated[39] and untreated water over two ounces of ion exchange material and analyzed the water at the conclusion of the experiment (R. II, 12). The experiment took about three hours (R. II, 51). The normal cycle of base exchange softeners in actual operation is from two to four weeks (R. II, 51). Dr. Adams (see footnote 33, supra), testing for the same purpose, dripped water over ion exchange columns for periods ranging from a little over seven hours to 30 hours.

Of these tests the Hearing Examiner said (R. I, 724):

> "Witness Merrell's experiment lasted about three hours, and Witness Adams' tests ranged from 430 minutes (seven hours and ten minutes) to thirty hours. It was shown that the normal operating cycle of a

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[37]In direct violation of respondents' specific instruction not to mix treated and untreated water (CX 31, R.VI, 898).

[38]See footnote 31, supra, p. 9.

[39]See footnote 31, supra, p. 9.

base-exchange softener is at least two to four weeks. It would appear, therefore, that neither experiment was conducted in a manner at all comparable to the practical operation of a base-exchange softener * * *."

Witnesses Mallory and Benezra rinsed glasses in Evis treated[40] and untreated water, let them dry and said they could observe no difference (R. II, 145, 576-577).

Witness de Bussieres found that both treated[41] and untreated water froze at the same temperature; that the conductivity of each was the same (R. II, 478-479). Neither test was shown to have the faintest bearing on any Evis claim or to be related in any way to the performance of the unit in actual operation.

Witness Wagner made infrared spectro-analyses of treated[42] and untreated water, testing for an "alteration in the molecular structure, the geometrical configuration of the molecules" in the water (R. II, 888). His spectrograms showed only the molecular structure of the water and disclosed nothing concerning the solids in it or the form in which they occurred (R. II, 889, 893). His test could have not the slightest relevance to the claims of respondents that the Evis unit affects the solids in water in such a way as to achieve the demonstrated beneficial results.

Dr. Hoffman, to whom we have referred (supra, pp. 10-14), made a surface tension test of treated[43] and untreated water and found no difference. Respondents have

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[40]See footnote 31, supra, p. 9.
[41]See footnote 31, supra, p. 9.
[42]See footnote 31, supra, p. 9.
[43]See footnote 31, supra, p. 9.

never represented that the Evis unit affects the surface tension of water. But Dr. Hoffman sought to relate his test to the representation of respondents that the Evis unit affects the behavior of water at the interface, i.e., its point of contact with metal or other substances. He testified on direct examination (R. III, 1118):

> "A. Any change in the behavior in water at the interface must be accompanied by a change in the surface tension."

The cross-examination of Dr. Hoffman after this categorical statement is illuminating. First, after long, critical and even embarrassing examination, he admitted that his surface tension test had been incorrectly conducted and for that reason "should be summarily discarded as valueless" (R. III, 1360, 1362). He then admitted that in fact the surface tension test was not a conclusive test of "the effect of Evis on water" (R. III, 1369):

> "Q. Do I understand from your testimony that you feel that the tension test is a final and conclusive test as to the possibility of Evis' effect upon water, having in mind that the water as we have just said passes through the pipe and through the Evis is in contact with a solid, whereas on the other hand in the tension test you have the isolated water not being in contact with the pipe or the Evis itself?
>
> * * * * *
>
> A. I would say no."

He then specifically recanted his original testimony (R. III, 1371):

> "Q. * * * [Does] the surface tension test * * * necessarily demonstrate the characteristics of that water when it comes in contact with a solid.
>
> A. Not completely."

And finally he admitted that a change in the physical characteristics of water would not necessarily have to be accompanied by a change in surface tension (R. III, 1312):

> "* * * Let me ask you this. Would a change in the physical characteristics of water, any change, necessarily * * * have to be accompanied by a change in surface tension?
>
> A. No, sir.
>
> Q. In other words, Doctor, there could be some changes in physical properties of water without a corresponding change in surface tension?
>
> A. That is correct."

Further, with reference to respondents' claim that the processing of the Evis unit affects the crystalline structure of the metal, which in turn affects the behavior of water he conceded (R. III, 1315):

> [illegible] that the angle of contact of water may be affected by the crystalline structure of a piece of metal such as brass?
>
> A. Yes, sir.
>
> Q. You know that?
>
> A. Oh, yes.
>
> Q. Are you familiar with the fact that the same is true in the case of iron?
>
> A. I presume it is."

Dr. Allison conducted a number of tests to determine, in his language, "what effect [the Evis unit] had on soil properties and plant growth" (R. II, 236-237). Dr. Allison's records, when produced on cross-examination (R. II, 257-258), showed:

(1) The corn plants irrigated with Evis treated water averaged one inch higher in growth—30 inches as compared to 29 inches (R. II, 289).

(2) In a test to determine the penetration of water into the soil the Evis treated water penetrated to a depth of .114 centimeter as compared with .108 for untreated water (R. II, 267-268).

(3) In a test to determine the effect of water upon the alkalinity of the soil the Evis treated water reduced alkalinity from a pH 9.3 to 8.7, or a difference of .6, while untreated water reduced the alkalinity from 9.3 to 8.9, or a difference of .4. Dr. Allison testified (R. II, 295):

"Q. So the difference in the change in the case of the Evis treated soil was half again as large as the difference in alkalinity of the soil that did not [illegible] d water, is that correct?

A. That is correct [illegible] • • •"

(4) In an electrical [illegible] conductivity test (which discloses the salinity of the soil) the Evis treated water reduced the rate from 3.80 to .99, a difference of 2.81, whereas untreated water reduced the rate from 3.80 to 1.32, a difference of 2.48 (R. II, 298).

(5) In a moisture retention test the soil irrigated with Evis treated water contained 26.0 atmospheres of water compared with 25.6 atmospheres with untreated water. Dr. Allison testified (R. II, 281):

"Q. So that there in the case of the Evas in this particular instance, [illegible] s treated water, it showed a

greater degree of moisture retention than did the untreated water, is that not correct?

A. Well, according to the figures there is a slight difference."

(6) In a test to determine the exchange sodium potential of soil the Evis treated water reduced the potential from 48 to 14, whereas untreated water reduced the potential from 48 to 15. Dr. Allison testified (R. II, 301):

"Q. * * * There is a difference between the rating of 14 in the case of Evis treated water as distinguished from the rating of 15 in the case of untreated water?

A. That is right.

Q. Nevertheless it is a change in a beneficial direction, is it not, doctor?

A. I would say it is a change and in a beneficial direction."

In short, each of these tests performed by Dr. Allison disclosed a beneficial difference in favor of water treated by the Evis unit.

In addition to the foregoing, the Commission introduced testimony of three laboratory tests designed to show that the Evis unit would not remove or prevent scale. Each of these tests is to be compared with actual operating conditions on the oil rigs, steamships, boilers, condensers, refrigerating equipment and other installations where the uncontradicted testimony of experienced engineers and operators incontrovertibly established that the Evis unit under normal field operating conditions did in fact remove scale and prevent its formation (supra, pp. 4-8).

The first of these tests was that of Mr. Merrell, who had "sniffed" the water and detected no difference, and who had admitted that his "test" for the prevention of scum was "just cooked up to deny that one statement" (supra, p. 15). He trickled treated[44] and untreated water through two eight-inch sections of half-inch badly scaled pipe at the rate of a little more than a quart a minute for four weeks. At the conclusion of this "experiment" he weighed each section and found that each had lost one gram (R. II, 16).

Dr. Weast conducted the next experiment in Cleveland. For thirty weeks he flowed, at intervals approximately one hour apart, ten gallons of treated[45] and untreated water through two parallel pipes heavily encrusted with deposits. Five times during the experiment he cut off short sections of pipe, split them longitudinally and photographed them (R. III, 991; CX 51 and 52, 2-13/6168-1 and 2-14/6168-2). He found no observable removal of encrustation. Apart again from the dissimilarity of this experiment to actual operating conditions, and apart from Dr. Weast's failure properly to install the equipment, Dr. Weast readily agreed that the deposits on the pipes with which he experimented were not the scale customarily encountered in water operations, but a mixture of scale and corrosion occasioned by the unusually high oxygen content of the water. Quite frankly he testified (R. III, 1008):

> "Q. Would you say this [deposit on the pipes] was in the category of rust?
>
> A. Yes."

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[44]See footnote 31, supra, p. 9.

[45]See footnote 31, supra, p. 9.

And again (R. III, 1073):

> "Q. And turning back now to the corrosion question I asked you, would your experience here in Cleveland with similar problems lead you to believe that in this case you had primarily a corrosion of pipes as a result of the high oxygen content of the Cleveland water?
>
> A. That is my opinion."

And again (R. III, 1027):

> "Q. Well, now, in the opinion that you rendered to the Hearing Examiner here as to the value of Evis in removing scale, would I be correct in assuming that that opinion was limited exclusively to the—what you have referred to as a 'rusty type of scale'?
>
> A. Yes."

There is no representation anywhere in the Evis literature that the unit will remove encrustations resulting from the corrosion of metals, as distinguished from ordinary scale deposited from the magnesiums, calciums and other solids customarily present in water.

The third test was made by Dr. Hoffman of the Bureau of Standards, to whose experiments we have referred above (supra, pp. 10-18). He took four sections of heavily encrusted pipe 2½ inches long (R. III, 1132, 1231, 1296), baked them in a dry oven at 100° Centigrade for 30 minutes,[46] trickled about half a pint per minute of treated[47] water through three sections, and of untreated water through one section, for a period of 68 days (R. III, 1133),

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[46]A procedure which is quite inexplicable, is hardly to be expected in practical installations, and which made the calcium carbonate in the scale as hard as cement (R.VI, 2977).

[47]See footnote 31, supra, p. 9.

found scale remaining in all four (R. III, 1137) and concluded that the Evis unit will not remove scale.

Finally, the Commission relied on the testimony of Drs. Albrook and Adams at Washington State College. These are the witnesses to whose credibility we already have referred (supra, p. 10). Under their supervision two Evis units were installed on coffee urns serving the students on the Washington State campus. These two urns, plus a third one supplied by chemically treated water, and a fourth one supplied with untreated water, were operated for five and one half months. They were then opened and inspected, and photographs of all four were introduced in evidence (CX 39, R. VI, 916). A mere inspection of these photographs on Commission's Exhibit 39 (pictures 1 and 4 are the Evis treated urns, picture 2 the water softener urn, and picture 3 the untreated urn) shows the extraordinary difference in favor of the Evis treated urns as compared with the untreated urn. It was the attempted explanation of this obvious result by Drs. Albrook and Adams (R. II, 596, 770-771; 851-853; 878), among other things, which led the Hearing Examiner to characterize their testimony as "too much intermingled and clouded with evasions, qualifications and attempted explanations" to constitute substantial evidence (R. I, 719).

ARGUMENT

1. THE TESTIMONY OF THE COMMISSION'S EXPERTS IS UNSUBSTANTIAL BECAUSE IT WAS BASED ON TESTS WHICH WERE CONDUCTED CONTRARY TO THE MANUFACTURER'S INSTRUCTIONS.

This is not a case where the witnesses testified from their own expert knowledge, as for example, where a doctor testifies that a particular nostrum cannot cure cancer or arthritis. This case involves a physical phenomenon—the effect upon the behavior of water by the introduction of the Evis unit into the water system. The experts, conceding the scientific principle that the introduction of a metal into a water system may affect the behavior of water,[18] undertook to test this particular device in the lab-

[18]That the behavior of water may be affected physically by metal, as well as chemically by chemical treatment, was recognized by Commission witness Weast (R. III, 1047-1048):

> "Is it also possible, in your opinion, Doctor, • • • that • • • there may be ways of preventing that corrosion from taking place, • • • by the addition of a third material of some type • • • ?
>
> A. This type of corrosion is controlled by the addition of chemicals which will tie up those ions which might be deposited on the iron to form galvanic cells on the iron.
>
> Q. Now, you are thinking there of the type of chemical treatment of water, as for example, where certain chemicals, phosphates or something of that kind, are actually put into the water in solution in the water?
>
> A. Yes.
>
> Q. Now, turning from that type of treatment, do you know, or do you have any opinion as to whether or not the same type of treatment might be brought about through the use of a metal that would simply, at some point in this water system of ours, be brought into contact with the water, so that you now had, instead of two metals in the water, you had three?
>
> A. Yes • • • This is a possibility."

Another example is the now familiar cathodic treatment of water (R. IV, 2997 et seq.). This method consists essentially of adding to the metal already present in the water system, another metal high on the galvanic series, such as zinc or—now more

oratory to seek to determine whether it had any effect. The testimony of the so-called experts was based upon these experiments and was substantial only to the extent their experiments were valid.

The record is perfectly clear that in their tests the Commission's experts did not install the Evis unit in accordance with the manufacturer's instructions. The Commission, here and in the court below, is compelled so to concede. In an effort to surmount this deficiency in proof, the Commission argues that it was free to find that its experts could disregard the instructions. This position is without merit in principle, is contrary to the testimony of the Commission's own experts, and is completely discredited by the record in this case.

As the Hearing Examiner held (R. I, 710):

> "It seems essential, however, that if a device is to be tested, the manufacturer's directions for the use thereof should be faithfully followed. It seems both unfair to the manufacturer and logically unsound to expect reliable results from an experiment conducted in disregard of the manufacturer's instructions for the proper use of the product being tested."

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commonly—magnesium. Corrosion is the result of electrical action between two metals of different potentials (R. III, 1010, 1021). Such differences may exist within a single casting (R. III, 1010, 1011). The cathodic treatment consists of placing an anode of a chemically more active metal within the water system, so that electrolysis is reversed and, instead of corrosion occurring on the permanent surfaces of the system, the anode itself—appropriately known as the "sacrificial anode"—is gradually disintegrated by the electrical action within the water. When it was suggested, even in recent times, that the mere attaching of pieces of zinc to the stern post of vessels would prevent the hull from corroding, those who advocated this treatment "were certainly held in bad repute * * * by most of the people working in the field" (R. IV, 2997). And yet today this method protects metal from the corrosive effects of water from the family water heater to the locks of the Panama Canal.

Commission witness Wakeman testified (R. II, 202-203):

"Q. If, in fact, Mr. Wakeman, the manufacturer of the Evis Water Conditioner had specified instructions as to the manner in which the Evis should be installed, and the installation which you made in your laboratory completely ignored, and in many instances was contrary to those instructions, would you feel that you had given the product a fair test?

A. I would not.

Q. So that in the instant case, if it can be demonstrated that the product was incorrectly installed, the tests which have been presented here this morning, both by yourself and by Mr. Mallory, would not in any way be conclusive, is that correct?

A. That is right."

And the Commission's principal witness, Dr. Hoffman of the Bureau of Standards, testified (R. III, 1272-1273, 1275):

"Q. * * * Let us assume that a manufacturer comes out with some new product. Let us assume that he has developed an entirely new scientific theory on which his product is based. Let us assume that the scientific world has not yet learned of that theory and has not yet had an opportunity to study it and evaluate it. Let us assume that that product goes out in the market and is used, and let us assume, as the record in this case shows, that in practical installations, that product is 97 per cent successful. Let us assume that the product is then brought to the National Bureau of Standards for testing and evaluating, and let us assume that the manufacturer has certain explicit instructions as to how the product is to be installed and operated.

> Now, when these tests are being conducted, let us assume whoever is conducting them is not familiar with the scientific theory that this inventor has developed. Do you not feel, Doctor, that under those circumstances, in all fairness to the inventor, as well as to yourself and the National Bureau of Standards, that the only reliable way to conduct a fair test would be to carry out to the letter the instructions of the manufacturer, irrespective of what your own opinions might be as to the value of the installation itself?
>
> * * * * * * *
>
> A. I think I will repeat what I said before. If the manufacturer has instructions, since he does not have the knowledge of the theory and I don't, then I believe I had better follow those instructions as nearly as possible as they are given."

Moreover in this case, as the court below pointed out (Pet. pp. 25-26), the testimony clearly shows why it was essential that the instructions be followed if valid results were to be obtained.

One of the important instructions which was disregarded provided for the appropriate grounding of the water system in order to eliminate stray electrical currents. The Evis Manufacturing Company commenced business in 1952. At that time the Evis unit, in the limited areas in which it had been installed, had operated successfully without grounding.

> "* * * we were under the impression * * * that all you had to do was install it in the pipe line, and it would remove the scale and prevent its reformation and in many, many cases that is so, that is true. We have thousands of installations where that is actually the case * * *" (R. IV, 2922).

Accordingly, the manufacturer's first instructions merely provided for fitting the unit into the main water supply line (CX 2, R. VI, 818). As numerous installations were made in different areas, however, difficulties appeared.

> "* * * so the field operators, the men in the field, began investigating these installations and trying to determine what the phenomenon might be that was causing it not to work * * *" (R. IV, 2923).

These investigations disclosed that electrical disturbances in the pipe lines were causing the trouble and that the installation of shunting and grounding wires was necessary to make the unit function (R. IV, 2923-2928, 3146-3147, 3154-3155, 3159-3162). The influence of electrical currents upon the behavior of water, of course, is well known (R. 2999-3000), and it is also known that the effect of these currents varies from place to place, depending upon the physical environment and the installations (R. IV, 2925, 2999-3000).

As the engineers and representatives of Evis Manufacturing Company pooled their knowledge and experience concerning the effect of electrical currents on the Evis unit, the manufacturer amended its instructions to reflect these discoveries. The Installation and Service Bulletin issued by petitioners six months before the institution of these proceedings (RX 34; R. VI, 1009-1012) was prepared at a meeting of approximately 30 representatives of the Company from all parts of the United States, who "pooled all of their knowledge of Evis installation techniques and * * * put it all into that bulletin" (R. IV, 2931). This bulletin was in the hands of the Commission

long before these proceedings were brought, as was also another bulletin issued at about the same time (CX 31, R. VI, 896-900) bearing a stamp showing its receipt by the Bureau of Investigation of the Commission five months before the complaint was filed. These instructions emphasized the necessity for grounding and described in detail how it should be done.

In installing and testing the Evis device the Commission's experts failed to follow these instructions. When the Commission offered in evidence the opinions based upon these experiments it knew that the experiments had been performed upon defective installations. The testimony of one or two of the experts that their results would have been the same if they had properly installed the equipment is, of course, mere conjecture. And the fact that the manufacturer himself had not realized the importance of grounding the equipment until experience had shown the necessity for this procedure cannot make substantial the testimony of the experts who disregarded the instructions in making the tests upon which their opinions were based.

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2. THE TESTIMONY OF THE COMMISSION'S EXPERTS IS UNSUBSTANTIAL BECAUSE IT WAS BASED ON IRRELEVANT TESTS.

The issue in these proceedings was whether the Evis unit has a beneficial effect upon the behavior of water when the unit is used in the practical operations for which it is intended and for which it is sold. The uncontradicted testimony of experienced and credible witnesses established that it does in fact produce this result. The fact

that Dr. Wagner found from his infrared spectro-analyses that the Evis unit produces "no alteration in the molecular structure, the geometric configuration of the molecules" in water (R. I, 813), or that Mr. de Bussieres, "a chemical engineer of long experience" who was interested in the "'dielectric constant,' a measure of the internal molecular structure of a substance," found that the water had not changed in certain characteristics which might change if the dielectric constant changed (R. I, 810), is irrelevant to this issue. Likewise irrelevant are the experiments of Mr. Merrell and Dr. Hoffman for the "removal of scale." These men based their opinions upon experiments in which they trickled a small dribble of water through short lengths of scaled pipe in a laboratory. Such artificial experiments have no relevance to actual operations.

For example, the testimony of experienced engineers established that the Evis unit produced exceptional results in marine evaporators on large ocean-going ships (supra, p. 5). In operation, these evaporators use vast quantities of water and are given massive "blow downs" every few hours. Continuous blow downs are essential to remove the partially evaporated water as its concentration of solids increases. The function of a water conditioner is to keep the solids in the water in suspension so that they will not adhere to the evaporator walls but will be "blown out" with each change of water (R. IV, 2646):

> "We shut off the steam supply, secured the evaporator, filled the evaporator up with water, opened up the steam supply, raised the pressure inside the shell, opened up the skin valve, the blow down valve on the

evaporator. The pressure blew the water out over the side, removing sludge and so forth."

Mr. O'Connell, one of the nation's most distinguished experts and consultants in the field of water uses and control (R. IV, 2956-2960), pointed out that every significant development in water treatment has been discovered in the field, and that the efficacy of water treatments cannot be determined in a laboratory (R. IV, 2992):

> "The concentrations of the material which we were dealing with are so small, and in the case of the treatment of surface waters so relatively variable that it is almost impossible to duplicate in a laboratory field conditions."

No one of the laboratory experiments by the Commission's experts resembled in the slightest measure the actual operating conditions under which the Evis unit was designed to function and did function. They were wholly artificial. The conclusions based upon them are irrelevant. They do not constitute substantial evidence.

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3. THE OPINION OF THE COMMISSION'S EXPERTS, BASED UPON IMPROPERLY CONDUCTED AND IRRELEVANT TESTS, IS UNSUBSTANTIAL FOR THE FURTHER REASON THAT IT IS CONTRARY TO PHYSICAL FACTS.

The basic error of the Commission is that it is seeking to apply to this case the principle that *subjective* "user testimonials," in the patent medicine and appliance field, do not furnish substantial evidence as against credible expert opinion. The *Sewell* case,[19] relied upon by the Com-

[19] *Sewell v. Federal Trade Commission*, 9 Cir. 1956, 240 F.2d 228.

mission, which involved a foot pad said to relieve aches and pains and lessen fatigue, is such a case. In contrast, the witnesses in this case were not from "that vast multitude which includes the ignorant, the unthinking and the credulous,"[50] who feel that their skin has been rejuvenated by the cream of Charles of the Ritz,[51] or who think that they find relief in patent medicines for hair and scalp,[52] or rheumatism,[53] or cancer, leprosy and malaria,[54] or in medical appliances.[55] No witness in the case testified to subjective feelings. On the contrary, as experts in the field of water uses—trained, intelligent, credible men—they testified to physical facts, objectively observable. They *saw* scale removed from evaporators, boilers and numerous other types of equipment; they *saw* this equipment operate without the formation of scale (supra, pp. 4-8).

An expert opinion that a phenomenon which in fact occurs cannot occur is not substantial evidence. Similarly, testimony that a laboratory test on a few liters of water shows no change in molecular structure or in dielectric constant or in conductivity or in surface tension, etc., is not substantial evidence that beneficial effects cannot

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[50] *Charles of the Ritz Dist. Corp. v. Federal Trade Com'n* (2 Cir. 1944) 143 F.2d 676, 679.

[51] Idem.

[52] *United States v. 503½ Dozen Bottles, etc.* (W.D. Mo. 1944) 54 F.Supp. 759.

[53] *Rhodes Pharmacal Co., Inc., et al.* (1952) 49 F.T.C. 263, 284.

[54] *Koch Laboratories, Inc., et al.* (1951) 48 F.T.C. 234, 249.

[55] *The Dobbs Truss Co., Inc., et al.* (1952) 48 F.T.C. 1090, 1113 [Docket No. 5808]; *Sewell v. Federal Trade Commission* (9 Cir. 1956) 240 F.2d 228.

occur in industrial and othe practical installations when in fact beneficial effects in ich installations *do* occur.[36]

"Opinion evidence in dict with the physical facts * * * is not substantial idence * * *.

Where physical fact * * * the facts must govern. contradict expert opinions, not prevail over such estimony of an expert can court nor jury is perm hysical facts: and neither contradicted. * * * ted to credit testimony so

Evidence contradicted the physical facts is entitled to no credence" (*State of Washington v. United States* (9 Cir. 1954) 21 2d 33, 43).[37]

As the court said in *Dea h v. United States* (9 Cir. 1935) 74 F.2d 619, a case in lving a claim of total and permanent disability (p. 622

"How can it be said t he could not work, when in fact he did work?"

The Commission's attitude summed up in a statement at page 50 of its brief in the urt below:

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[36] Also, as the court pointed in *Navajo Freight Lines v.* *Mahaffy* (10 Cir. 1949) 174 F.2 05, 310.

"The party offering evid of out-of-court experiments must lay a proper foundat by showing a similarity of circumstances and con ition * * * Evidence of this k * * tion * * *. In many instances should be received with cautions under which the expera slight change in the condiresult: as to wholly destroy it is made will so distort the it harmful, rather than help value as evidence, and make

[37] And see:

Differential Steel Car Co. Ja Donald (6 Cir. 1950) 180 F.2d 260, 268;

Galloway v. United States ir. 1942) 130 F.2d 467, 471;

United States v. Thornbo Cir. 1940) 111 F.2d 278, 280.

> "Yet no one can be so credulous as to believe that a scientific invention cannot be proved by scientific tests."

This arbitrary position is not only rebutted by numerous occurrences within common knowledge, but is discredited by the testimony in this very record. To take but one example, the threshold treatment of water simply cannot be scientifically explained (see R. IV, 3001-3003); it operates directly contrary to all known laws of chemistry. And this was established not only by respondents' witnesses, but by the Commission's own expert (R. III, 1053):

> "A. Well, this is in the threshold treatment of water with hexametaphosphate, where the stoichiometric amount of hexametaphosphate required to prevent the precipitation of calcium carbonate does not follow the laws of chemistry which involve prime valence forces."

CONCLUSION.

The "important question" the Commission says is presented by this case (Pet., p. 9) does not exist. No substantial "expert scientific testimony" was introduced by the Commission. The *Sewell* case, which involved subjective "satisfied customer" evidence concerning a medical appliance, is not in point. The Court of Appeals did not, as the Commission contends "make its own appraisal of the testimony" (Pet., p. 13). It limited its review strictly to what the Commission says is its proper function, namely "whether the Commission's appraisal of testimony has substantial support in the record" (Pet., p. 13). It found, and the record supports it—not only for

the reasons it gave but for the others discussed above—that no substantial evidence supports the Commission's findings. On this issue, nothing but a question of fact on a 4,000-page record exists. It presents no issue for this Court.

The petition for a writ of certiorari should be denied.

Dated: San Francisco, California,
July 17, 1961.

Respectfully submitted,

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MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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The position of the Federal Trade Commission, that the court of appeals ignored established principles governing judicial review of Commission orders by making its own appraisal of the facts, is fully set out in the petition for a writ of certiorari. While we believe that the essential facts are adequately set forth in the petition, respondents' brief in opposition, by picking and choosing from the interstices of a lengthy record, may give an unwarranted impression of the character of the evidence before the Commis-